2001

James F. Trees v. Walter M. Lewis : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

JAMES F. TREES,	)	
Plaintiff-Respondent,	)	
vs.	)	Case No. 19333
WALTER M. LEWIS,	)	
Defendant-Appellant.	)	

RESPONDENT'S BRIEF ON APPEAL

Appeal and Cross-Appeal from Judgment of Fifth Judicial District Court of Washington County, State of Utah, the Honorable J. Harlan Burns, District Judge.

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KEY TO ABBREVIATIONS

AB	Appellant's Brief
1DWL	First Deposition of Walter Lewis
2DWL	Second Deposition of Walter Lewis
F	Finding of Fact
JFT	Deposition of James F. Trees
P	Exhibit
R1	Record, Volume 1
R2	Record, Volume 2
R3	Record, Volume 3
R4	Record, Volume 4
T	Transcript of Trial
T 12/8/82-12/9/82	Transcript of Pretrial December 8, 1982 and December 9, 1982
T 4/1/83	Transcript, April 1, 1983
T 4/14/83	Transcript, April 14, 1983

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES F. TREES	)	
Plaintiff, Respondent,	)	RESPONDENT'S BRIEF
vs.	)	
WALTER M. LEWIS,	)	No. 19333
Defendant, Appellant.	)	

NATURE OF THE CASE

The Respondent James F. Trees sought specific performance on several theories of an agreement to purchase part of the old Shunesburg Ranch. Alternatively, Respondent sought damages from his purchase of the remaining 1,067 acres of the Ranch at Appellant's insistence, as a condition precedent to purchasing Appellant's portion of the Ranch. Appellant claimed that there had been little more than an outstanding counteroffer, which Respondent had orally rejected, thus terminating Respondent's power of acceptance.

DISPOSITION OF THE TRIAL COURT

An advisory jury empaneled at Appellant's request unanimously found for Respondent. The Honorable J. Harlan Burns specifically adopted the jury's answers, entered additional consistent findings, and reaffirmed the jury verdict.

RELIEF SOUGHT ON APPEAL

Respondent states that Appellant's failure to comply with Rule 75(p)(2)(2)(d) U.R.C.P. allows this Court to summarily assume the correctness of both the jury verdict and trial judgment below. Respondent also seeks affirmation of the jury verdict on several alternative grounds. Lastly, Respondent asserts that Appellant has waived or abandoned his right to an appeal by accepting Respondent's tender subsequent to trial and voluntarily vacating the subject matter property.

Appellant seeks reversal of the judgment, or an order requiring that this matter be retried.

STATEMENT OF THE FACTS

Appellant's statement of the facts fails to comply with Rule 75(p)(2)(2)(d) U.R.C.P. Selective and self-serving, with no citation to the record, it is contrary to the overwhelming evidence in this case, the jury verdict, and the judgment and decree of specific performance. Consequently, Respondent is compelled by Rule 75(p)(2) U.R.C.P. to independently state the facts supporting the same with appropriate citation to the record.

The Respondent James F. Trees obtained a liberal arts education from DePauw University, and graduate degrees from Harvard University. T138. In the fall of 1980, he came to Utah looking for ground aesthetically beautiful and remote upon which to conduct a small-scale agricultural operation and self-sufficient farm. T130. Being previously acquainted with Utah, Trees was particularly interested in property near Zion National Park. Upon viewing the old Shunesburg Ranch with his

agent, a Mr. Hogle from Arizona, Trees fell in love with it. T130; P1.

Historically, Mormon pioneers first developed the old Shunesburg Ranch around 1860 at Brigham Young's request that the headwaters of the Virgin River be managed for agricultural purposes. T557-58. Indian ruins on the property evidence earlier inhabitants, the ancient cliff-dwellers. Id. When Trees first visited Shunesburg, its ownership was in two parties: the DeMille family, who originally owned the entire Ranch, and Walter Lewis. The DeMille parcel, though comprising 1,067 acres, has a dedicated water right sufficient for only 8.7 acres, and can best be described as a "rough, rocky parcel of property". T541. Appellant himself graciously characterized it as "nothing but hills and rocks". First Deposition of Walter Lewis [hereinafter 1DWL] at 42. The cross-hatched area on P1 shows the remaining 160 acres of the old Shunesburg Ranch then owned by Appellant. T41-42. Abutted to the east and north by Zion National Park and surrounded by federal ground, this property consists of two separate pieces, one being the entryway into the old Shunesburg Ranch, and the other comprising the main farm on the far east side. Containing 90% of the arable land and a vast majority of the water right, Appellant described it as the "heart" of the Ranch. 1DWL at 42; T41. This property also had a habitable residence with an adjoining guest house. T556. While Appellant's counsel refers to still another "home" as the Shunesburg "mansion", the "mansion", as such, is little more than an uninhabitable "relic" in the words of his client. T556-57; Second

Deposition of Walter Lewis [hereinafter 2DWL] at 120, cf. Appellant's Brief [hereinafter AB] at 2.

In 1980, Appellant resided in a suburb of Chicago, Illinois. President of Stereo Optical Company, he was a man of considerable education, with an advanced degree in accounting, training in civil engineering, and a doctorate in optometry. T40-42, 109. Having acquired the Utah ranch seven years earlier, Appellant had only been able to spend some weeks in the summer and a few Christmases there. T555.

During this time, Appellant often indicated that if he sold the property, he would want a buyer with lots of money who did not know what to do with it. T490, 559-60. When Trees requested to visit the property in 1980, Lewis consented. T563. And, while Trees continued to be represented by Mr. Hogle, Lewis was being contacted by a local agent, Mr. Milne. While Appellant indicates that Trees hired Milne to acquire an option on the property, at trial, Milne's agency for either party remained unproven. See AB at 3; cf. Finding of Fact [hereinafter F] 7.

After visiting the property, Milne advised Lewis that Trees and Hogle were pursuing the property, and the parties arranged for a meeting in Chicago. T563-64. At this meeting, Lewis arrived prepared with maps, descriptions of the water rights, and several slides of the ranch specifically to increase Trees' interest in the property. T564-65. Trees then asked Lewis if he could look at the ranch once more, and Lewis subsequently decided that he would meet Trees at the ranch. T565; 1DWL14.

At this later meeting, Mr. Hatch, an agent for Mr. Milne, brought an appraisal requested by Lewis showing a total value his portion of the old Shunesburg Ranch as being $230,000. Early discussions regarding a deferred purchase price with 8% interest were entertained. T577. While nowhere mentioned in his brief, Appellant then also revealed that he had less than a neighborly relationship with the DeMilles, who Appellant claimed had tried to steal some of his water. 2DWL131-32. And, through extensive negotiations regarding the purchase of the Lewis ranch, Appellant remained adamant that Trees should first be able to acquire the DeMille property. See F1, 2; T89-90, 593-94; P23. At this meeting, the potential of deeding Lewis' property to BYU and having Trees then purchase it with an annuity back to Lewis was also discussed. After Lewis met with Mr. Kimber Ricks of BYU, Lewis rejected it as economically unattractive. Appellant also indicated desires to retain some visitation to the ranch, with which Trees was perfectly comfortable. T567-68. Suggestions pertaining to Lewis' retention of the habitable home for sixty days with a perennial lease to Trees for ten months each year and a purchase option upon Lewis' demise were also discussed. T570. Ultimately, Lewis indicated that by reason of his wife's ill health, it would be more convenient to him to occasionally stay overnight, and that he would build another, more accessible home nearly on property he also owned. T509-10, 560. Nonetheless, Lewis persisted that his desires to retain some rights of visitation would be more comfortably accommodated if the DeMilles were first removed from Shunesburg. T593-94.

Early on Appellant sought advice from several professionals, including an attorney, in reference to these negotiations. T568, 578-80. After Appellant rejected Trees' offer of $230,000 as insufficiently attractive, Trees then increased his net purchase price to $270,000 and the interest rate to 14%. T584-85. Appellant, then feeling good about his negotiations with Trees, communicated to Trees that he would accept this offer. T585-86. Because both parties now desired to unify the ranch under Trees' ownership, they decided that Trees would take an "option" on the Lewis property, pending his potential ability to acquire the DeMille parcel. See F2; T131, 370.

Appellant then phoned Trees on the 3rd of December. T594. During this conversation, Trees suggested that he could stable Appellant's horse on the property to facilitate Appellant's enjoyment of his visitation rights. T594-95. Mr. Steven E. Snow, Trees' attorney and attorney-in-fact, then drafted the real estate option, P5, and Mr. Hatch took it to Chicago for Appellant's signature. T317. Hatch, as an agent of Milne, also took a listing agreement which, as executed by Lewis, indicated a gross purchase price of $300,000, with a $30,000 commission to be divided between Hogle and Milne. T513; P54; F5.

Though Trees was familiar with the essentials of P5, Snow had reviewed it with him only orally and it had not been read to him. T142-43. By oversight, Snow initially failed to include a visitation provision in the original document. T313. Prior to

executing P5, however, two handwritten changes were made at Appellant's request. T46-47, 586-87, F6. One change regarded tax ramifications upon the occurrence of accelerated payments, and neither party claimed any materiality regarding it. See F8. The latter change drafted by Appellant as an addendum on page 4 of P5 became the focal point of Appellant's case. It states as follows: "Additionally, it is understood that there exists an agreement between optionee and optionor for mutually agreeable visitation rights for optionor."

Hatch telephoned Trees regarding the change, and as this provision reflected a then existing agreement of which Trees was fully aware, he said it was fine. T49, 131, 151-52. Indeed, the trial court specifically found that both parties understood the terms of Appellant's retained visitation prior to Appellant's executing P5, and beyond that, that the agreement itself otherwise accurately described the property and the negotiated terms of sale, including price, manner of payment and security therefor. See F10, 55; T78. In reference to his addendum, Appellant testified that when it was made he knew what visitation rights had been agreed to, and that the agreement then existed between the parties. T613-14, 617. Similarly, the trial court found that the addendum evidenced an existing oral understanding shared and accepted by both parties. See F7.

Three other negotiated provisions were material to the parties' agreement. First, P5, "the option" provided for a thirty-day closing period after exercise for the preparation of final documents of transfer and retention of security in reference

to the proposed sale. F10; P5 at ¶8. Secondly, Appellant conceded that he negotiated and set forth the only manner in which Mr. Trees could exercise "the option". T81, 85-86. As required, Trees could exercise only . . .

> [b]y depositing in the U. S. mail, postage prepaid, written notice to optionor of exercise, addressed to optionor accompanied by Thirty-Four Thousand Dollars ($34,000.00) in lawful money of the United States, cash, cashier's check or money order. Said notice must be given on or before December 31, 1980. See P5 at ¶5; F10; T88.

Lastly, due to Trees' anticipated expense in acquiring the DeMille parcel, the parties separately negotiated a provision which specifically required Appellant to notify Respondent in writing of any perceived failure to perform pursuant to the parties' agreement and allow Respondent an opportunity to cure. As specifically set forth in paragraph 11 of P5:

> Should optionee fail to comply with any of the terms hereof, optionor shall give optionee written notice giving particulars in which optionee is in default, and should optionee fail to cure such default within ten (10) days of mailing of said notice, this contract shall be terminated without further act of either party. See F11, T382-83.

The above provision was uniquely important to Trees, insofar as he anticipated spending close to $600,000 in acquiring the DeMille property. Noteworthy, in reviewing the parties' negotiations and their total agreement, the trial court found that the parties intended that paragraph 11 of P5, the December 4th, 1980 document

> . . . would be employed to resolve any disputes between them and would allow Defendant an opportunity to specify with particularity whatever problems he might have as to any tender or variance in the performance of Plaintiff, and on the other hand, would allow Plaintiff, upon receipt of such notice, an opportunity to cure any claimed default. See F53.

Two days after executing P5, Appellant copied to Trees a letter mailed to the Superintendent of Zion National Park. In that letter Appellant indicated that Respondent had an option and would take over ownership at the end of the year, but that Appellant would maintain some involvement and part-time residency during his lifetime. P12. Trees testified that this was consistent with his understanding of the parties' agreement. T306. Immediately after the Appellant's execution of P-5, Trees authorized the issuance of a check for $1,000 to hold that document open through December for Trees' acceptance. T132-33. Appellant received this check on December 9th, 1980. T46-47; F9; P9. A cover letter accompanying the check contained the following simple statement:

> Enclosed please find check for $1,000.00 as option deposit from Mr. James F. Trees as per agreement. P8.

On December 17th, 1980, Appellant sent a letter and enclosure to Mr. Hatch in St. George, the real estate agent who had earlier gone to Chicago. In this letter Lewis indicated that, though not concerned, he thought "it would be wise to put a statement in writing as to the 'agreement' mentioned at the close of the option document". P14. Lewis testified that the enclosure, marked as P15, did not change the existing understanding of the parties, but simply memorialized the same. T49-50, 628-29. Similarly, Trees testified that he was 100% in agreement with the language set forth in P15. T268. Commensurately, the trial court found that P15, as drafted by Appellant, merely clarified the details of the then existing oral

agreement referred to in P5. And, while P15 on its face required the separate physical signature of Trees, Appellant testified that it was not material to him, so long as Trees would sign P15 during the option's closing period. T122; 2DWL at 50; P5 at ¶8. Consequently, the trial court also found that . . .

> it was not material to Defendant so long as Plaintiff agreed to the terms of the writing [P15] and would execute the same during the closing period for the purchase of the property. F22.

Appellant's only concern at this time was that if Respondent predeceased him after exercise, Appellant would have to deal with another party. T624. The trial court incorporated P15 verbatim in both the decree and the recorded documents pertaining to specific performance. See Record, Volume 3 [hereinafter R3] at 30-31, 38; P59 and 60, Supplemental Record filed June, 1984.

A series of stipulations now becomes material to the subsequent recitation of facts. Under Higlee v. McDonald, No. 18755, filed April 27th, 1984, they are conclusive and binding on the parties, preclude the adoption of conflicting findings, and should be of particular interest to this Court:

(1) [B]oth parties stipulated that the December 17th enclosure (P15) was part and parcel of the December 4 document entitled real estate option (P5), insofar as it clarified the addendum thereto, and both Plaintiff and Defendant further stipulated that it accurately and adequately set forth their agreement pertaining to visitation. F20; see also T 12/8/82-12/9/82; T136.

(2) [D]efendant granted three written extensions of P5 and P15; thus, these instruments, taken together, were held open until May 30th, 1981 by Defendant for acceptance by Plaintiff. F25.

(3) [R]egardless of whether the December 4th, 1980 document entitled real estate option as clarified

by the December 17th, 1980 memorialization was an option or a counteroffer, the same was held out by the Defendant for the Plaintiff's acceptance through May 30th, 1981. T346-47, F29.

(4) Plaintiff tendered orally and in writing to pay the amount of money required by the documents, with agreed credit for amounts previously received by the Defendant for extensions. (T 12/8/82-12/9/82; T347.

(5) From and after the 30th of May, 1981, the Defendant did at no time notify Mr. Trees specifying any defect or failure in Mr. Trees' tender or performance. T136, 410-12.

(6) Defendant further stipulated that concurrently the Plaintiff was not in default in any particular in his obligations from December 4th, 1980 up through and including May 30th, 1981, which proposition the court specifically accepted. F14.

(7) Lastly, at trial the parties stipulated that P5 and P15 were to be considered together as but one document and treated as the same. F17.

Exhibit P15 as mailed to Hatch by Lewis was subsequently left by Hatch at the St. George offices of attorney Snow. F24. Until May 27th, 1981, Lewis never inquired of anyone about P15, and indeed, despite "abundant opportunity", would speak to neither Hatch nor Trees about the same. F26. Meanwhile, Trees was not informed of P15. By mid-December, 1980, Trees, in good faith, was engrossed in immediate negotiations with the DeMilles which initially were not fruitful. F25.

As previously stated, whether denominated as an "option" or "counteroffer", Appellant's offer to sell remained open through May 30th, 1981, by reason of three written extensions for which, in part, $1,500 was paid as consideration to be credited toward "exercising the option". F25. Trees' frequent reports that he was having difficulty closing with the DeMilles were the basis for

each extension. T52-53. With each request for an extension, Respondent would personally contact Appellant, after which would follow a call to Appellant by Respondent's attorney, Mr. Snow. F25. On other occasions, Trees simply called Appellant to discuss problems he was having with the DeMilles concerning mineral rights, access, or negotiations regarding price. To encourage the DeMilles to sell, Appellant told them that if they would sell he had an option agreement that would doubtless be exercised, and that he would sell also. T632. Unbeknownst to Trees, however, Appellant had also been contacted through Dale Docksteader, yet another real estate agent, by Robert Redford regarding the property. In late March, Appellant finally told Trees about Redford. T624-25. Meanwhile, pending Respondent's solving his problems with the DeMilles, Appellant covertly felt that P15 was concededly unimportant. T352; see Answer to Interrogatory No. 55, R1 at 352.

The trial court found that in each extension granted by Appellant . . .

> the words used by the parties in reference to the nature of their agreement were "The Option" and in Defendant's [Appellant's] mind the word "option" referred to the December 4th and 17th documents [P5, P15], which taken together comprised in their entirety Defendant's proposal to sell the property. F27.

During the same period of time, the DeMilles also spoke to Appellant, who was well aware of Trees' difficulty with them. T589. As Trees became concerned about losing Appellant's property to Mr. Redford, Appellant became increasingly impatient due to Trees' failure to reach an agreement with the DeMilles and

exercise "the option". T25, 591-92. Ultimately, Snow proposed that Trees exercise the option prior to reaching an agreement with the DeMilles, but Appellant was again adamant that Trees not exercise the option absent this condition. T382, 593. As Appellant specifically stated in his last extension:

> I, Walter M. Lewis, hereby extend the option of Nov. 1980 for another 30 days.
> As my part is dependent on Jim's first being able to acquire the DeMille property, I don't know how else we could do this--but extensions cannot of course go on indefinitely as there is a considerable financial loss involved for me each time. Sincerely, /s/ Walter M. Lewis P23.

It was conceded by Lewis at trial that even though P23 refers to a November, 1980 option, Appellant's intended reference was to P5. F28; T54. Clearly, however, Lewis' sale depended on Trees first being able to acquire the DeMille property. T54.

Appellant conceded that during the spring of 1981 he had at least five conversations with Trees. T619. Trees placed the figure at closer to ten. T291. Appellant had additional conversations with Snow. Several of the problems with the DeMilles were amplified upon, and other matters, including mineral rights, a potential location for Trees' post office box, and maximization of access to the Ranch by constructing a bridge were discussed. T291-92, 321-23; see also F25. Despite these conversations, however, Appellant never spoke to Hatch or Trees about P15, the December 17th memorandum, until late May of 1981, despite abundant opportunities to do so! F26. While the evidence conflicted regarding the substance of conversations between Appellant and attorney Snow during this period, the trial court,

nonetheless, found that no issue of importance ever arose between the parties on or before May 27th, 1981. Id.

On May 26th, 1981, after a substantial expenditure of time and attorney's fees, and in conformity with Appellant's demand that Trees first be able to acquire the DeMille property, Trees successfully completed his negotiations with the DeMilles. See F30; T251-60, 276, 278-79, 327-30. Thus, on that date, subject only to Trees' proceeding in good faith to close, his transaction with the DeMilles had been successfully culminated, and Trees' ability to close with the DeMilles was never raised as an issue. See F31 and 32. Despite an appraisal indicating that the DeMille property alone had a value of only $613,000, Trees ultimately paid $846,000 to acquire it. See P58; cf. T136-38.

On May 27th, 1981, Trees excitedly phoned Appellant to report that he had successfully completed his negotiations with the DeMilles. T309-10. Appellant now characterizes this conversation as Respondent's oral rejection of his "counteroffer", a term which Appellant first conceived at the insistence of his attorney some two weeks later. T613; 2DWL at 87, 109; AB 5, 7-8. The thrust of this conversation, if closely scrutinized, however, rejected nothing, and instead evidenced Trees' firm commitment to comply with the parties' bargain. See F33. Trees related the conversation on pages 279-81 of the transcript as follows:

> I called Walter. I was feeling quite good, because we had many discussions over the past previous two or three months. He was aware that I was trying to settle this dispute with the DeMilles. In fact he gave me some suggestions about it. . . I probably said something like, "Good morning, Walter." I said I was really happy and I thought he would be very happy. And I said, "I

> settled the DeMille situation. I am able to close on it." And he [Mr. Lewis] went blank; there was a silence and he still didn't say anything. And that felt very weird to me because we had been having very warm conversations over the previous months. So I thought maybe he was upset because (Objection by Mr. Bell) . . . I next said, "Well, Walter, I know you wanted the initial payment split in two tax years to save taxes." And I said, "Because of the delays that, you know, no longer applies, I'll be happy to do that for you the next year," if that was what he was upset about.

Trees then explained that in late December, the payment schedule allowed Appellant to spread the initial income over two tax years, and that Trees was willing to do that if a May exercise was otherwise problematic to Lewis. T281-82. Trees then continued:

> Then there was kind of a silence and then he said something like, and he was kinda hot, and he said, "Where is the write-up of my sixty-day write-up," or something like that. T283.

At this point in time Trees thought Lewis may have been referring to the old lease, as he had never in fact heard of P15 at that time and did not know what Lewis was talking about. T172, 217. Trees continued as follows:

> I was a little stunned. I didn't know what he was talking about. And I said, "Walter, what do you mean?" And he said, "Where is the write-up of my sixty write-up." He did it again in a very angry tone, which I had not heard from him before. And I said, "Walter, what do you mean. You have no write-up of sixty-day rights?" And he blurted out, "You call Mike Hatch. He knows all about it." And I said, "Walter, I will. Calm down. Let me find out and I'll call Mike Hatch and get right back to you." (T282-83)

This May 27th conversation ended on a very interesting note. Trees testified to its conclusion as follows:

> Lewis: "Oh, yeah, . . . if you think that the DeMilles have given you a hard time, you haven't seen nothing yet."

> Trees: "Walter, I'll call Mike Hatch. Just calm down. I'll be right back to you. Whatever our agreement is I'll honor it. I'll get right back to you." T283.

Standing alone, the above commentary may appear remarkably self-serving, but Lewis also confirmed this ending to the parties' conversation. Thus, Appellant, upon cross-examination, reluctantly conceded that Trees reaffirmed on the 27th of May that he [Trees] would honor his commitments, which Lewis also stated at his deposition. T641; 2DWL at 14;7; see also F34. Furthermore, Lewis also conceded that he angrily told Trees that if Trees thought the DeMilles had given him trouble, that he hadn't seen anything yet because he [Lewis] would be a more stubborn foe. T649-50; 2DWL at 125. Importantly, from and after May 27th, 1981, Appellant took a position resisting the sale, and regardless of what Trees did or tendered, Appellant would not close. T 4/1/83 at 29-30; 2DWL 110, 125; T213, 650. Indeed, after May 27th, Trees never understood why Lewis would not close, and Lewis would never explain why. T612. Lewis conceded that he initially contacted Mr. Bell following this conversation, and that thereafter he resisted any further pursuit of the matter. T601-03, 642. Appellant evasively then told Snow that he was simply not happy with the transaction. T-387. He told Trees that he had simply lost faith. Often he was simply silent. Regardless, the trial court found that after May 27th, 1981 there was not . . .

> anything that James Trees could have done to bring about a satisfactory consummation of it, from the proof . . . [the trial judge] heard. (T 4/1/83 at 28-29; T213.

Immediately after conversing with Lewis, Trees, at Lewis' instruction, phoned Hatch. Hatch, in turn, then phoned

Lewis, and Trees, at Hatch's direction, then contacted Snow, who though previously not aware of the contents of P15, now studied it very carefully. T358-59, 417, 600.

On May 28th, 1981, Trees again phoned Snow who advised Trees that P15 comported with the parties' agreement. T238; F36. As Jim Trees was then in Sagaponack, New York, on May 29th, 1983 he again phoned Snow to obtain instructions on how to exercise "the option", having decided to accept both P5 and P15 as drafted. T184, 146-47. Snow then dictated to Trees the letter mailed pursuant to paragraph 11 of P5. T147, 424-25; P24. A cashier's check for $32,500 was also tendered as required for exercise with credit for the $1,500 previously received by Lewis. Id., P25. P24, addressed to Walter Lewis and timely mailed on May 29th, 1981, states in pertinent part as follows:

> Dear Walter: In accordance with the terms of our contract, and the extensions hereof, I hereby exercise my option to purchase the property in Utah. . . Sincerely, James F. Trees.

Again, regardless of the content of the May 27th, 1981 conversation, both parties stipulated that whether Lewis' offer be characterized as an option or a counteroffer, the same was left open for acceptance through May 30th, 1981. Supra at 10-11. And while Trees used the words "the option" in referring to both P5 and P15, as did Appellant, the trial court did not find the letter itself unambiguous. See e.g., T 4/14/83 at 5. Clarifying any ambiguity, Trees testified that this letter was meant to incorporate both P5 and P15, treating the same as one document, to which the parties stipulated. T145, 147-48, 211-12, 214, 222;

supra at 10-11; see also T376-78, 428-29, 669, 470. The trial court, adopting the jury's findings, also found that regardless of the documents' nomenclature, that is, whether denominated together as an option or counteroffer, that Respondent, by his letter and tendered cashier's check, did accept any and all counteroffers, options or proposals in whatever form had been submitted by both P5 and P15. (See F13, 19, 29, 44; T 4/1/83 at 29-30) Trees never has withdrawn this tender. See F44, 45.

FRUSTRATION OF CONTRACT

Shortly after P24 and P25 were mailed on May 29th, 1983, and prior to withdrawing Appellant's offer, Appellant received them. T94-F49. Though the tender was consistent with the terms of the parties' agreement, Lewis, nonetheless, advised several people, including Trees, that he would no longer close the transaction. T209, 376, 477, 635, 642; P24. Subsequently, Trees actively explored what Lewis wanted, with Lewis himself conceding that Trees even begged him what additional performance was required as a condition precedent to closing. See T136-37. A perusal of Lewis' deposition reveals the following:

> Q: (By Mr. Hughes) After May 28th, do you recall Mr. Trees at any time saying words to the effect that "Walter [Mr. Lewis], please tell me what you want, put in writing what you want so I can comply"?
> A: (By Mr. Lewis) As time went on, he said that several times. (2DWL at 93-94)

Though Trees tried to close several times saying he would sign any additional document Lewis wanted, Lewis, in response, never told or wrote Trees how his tender was insufficient and stubbornly refused to close. T107, 127, 209,

635-36. Thus, Trees never knew what else Lewis desired as a condition precedent to closing. T136-37. The trial court similarly found that though Appellant kept Trees' tender for two weeks, neither Appellant nor his agents ever objected to its sufficiency or nature. See F49-52. The trial court further found that even beyond the obvious statutory proscriptions regarding tender, Appellant should have contractually employed paragraph 11 of P5 to resolve any problem he might have had with Trees' performance. See F3.

Finally, on June 12th, Appellant overtly took a "new position", refusing Trees' performance and shutting the door on the transaction. 2DWL at 110, P26. Communicated by Appellant's attorney's letter, this was the first written communication from Lewis to Trees after May 29th. P26; T644. In that letter, Mr. Bell used the word "counteroffer" in reference to P5 and P15 for the first time. T613; 2DWL at 109. Mr. Bell also suggested these words to Lewis, even though Lewis had previously referred to both documents as "the option". See 2DWL at 87. On June 13th, over two weeks after Trees' tender, Appellant returned it, without comment or clarification. See F56; P27.

ATTEMPTED SETTLEMENT

A few days later Lewis advised both Milne and Trees that his lawyer, Mr. Bell, had found P15 unacceptable. T162, 188-89, 209, 391, 393, 483. In settlement discussions with Lewis, several proposals drafted by Mr. Milne were submitted. T209, 482. Though not exactly what Trees had agreed to as set forth in P15, Trees authorized Snow to execute these proposals, as Lewis had indicated

to Milne and Trees that they might be acceptable to him. T206-09, 162, 188-89, 391, 393, 402; P28, 29. Ultimately, Lewis also rejected these proposals generated by Milne. During closing, Lewis truly felt that he had fulfilled his promise of May 27th that he would give Trees more problems that the DeMilles and be a truly harsh opponent. T650-51; 2DWL at 125.

TRIAL

At trial the issues were whether P5 and P15 comprised an option or a counteroffer, and whether Respondent had accepted the same. See F77. Though Mr. Bell appeared openly dissatisfied with his client's testimony, the jury, nonetheless, found a counteroffer. T647-48; F39, 40. The jury, however, further unanimously held that Jim Trees had accepted the same. (F39, 40) While the trial judge subjectively felt that P5 and P15 constituted an option; regardless, he found the evidence clear and convincing that in either event Trees had timely accepted the same. See T 4/1/83 at 14; F40. The trial court further found that the parties' minds had met, and that despite Trees' substantial tender, Lewis never notified Trees of any default or insufficiency in Trees' performance. See F40, 43, 46.

Regarding attorney's fees, the trial court awarded Respondent $45,000 after extensive testimony and briefing on the issue. See F60, 62; T698-729; R3 at 90, 107. The trial court dismissed prima facie Respondent's alternative cause of action for economic losses suffered in purchasing the DeMille property. See Conclusion of Law No. 10.

POST-TRIAL CLOSING

The trial court established June 17th, 1983, as a closing date. R4 at 39-43. A deed and mortgage were subsequently recorded recognizing Appellant's agreed right of visitation. P59, 60; Supp. Record filed 6/84. Trees' original mortgage note was delivered to Appellant. R4 at 36, 43.

In early June of 1983, Appellant's counsel notified both Respondent and his counsel that Appellant was vacating the premises. See Affidavit of James F. Trees filed 9/27/83, ¶s 3-5. On June 17th, 1983, Respondent began peacefully residing there. Id. Trees has now tendered two checks for $70,000 in conformity with the mortgage note and judicial decree. Despite his July, 1983 appeal, Lewis subsequently cashed these checks. Id., all §s with exhibits; see also 75(h) U.R.C.P. order amending record filed 6/84. No supersedeas bond has been filed. A third $28,000 check has also been sent to Appellant.

POINT I

APPROPRIATE STANDARDS OF APPELLATE REVIEW COMPEL THE AFFIRMATION OF THE ADVISORY JURY'S VERDICT AS CONCURRED IN BY THE TRIAL COURT

A. Under Utah law, the Supreme Court does not reverse unless the evidence clearly preponderates against the Findings of the trial court.

Respondent sought specific performance of a written contract to convey real estate. A contract's commitments are determined from a thorough examination of the circumstances pertaining to its execution and formation. See Otteson v. Malone, 584 P.2d 878 (Utah 1978). While Respondent concedes that specific performance of oral contracts may require a greater degree of

certainty, regardless, the same burden of proof does not follow the trial court decision on appeal as Appellant suggests. See, e.g., Reed v. Alvey, 610 P.2d 1374 (Utah 1980); cf. Pitcher v. Lauritzen, 423 P.2d 491 (Utah 1967); AB at 9-10. Thus, the Utah Supreme Court unanimously holds that even where the level of proof at trial is clear and convincing, the appellate court, nonetheless, applies the "clearly preponderates standard". See Bown v. Loveland, 678 P.2d 292 (Utah 1984). Under this standard, the Supreme Court does not reverse the trial court's judgment, unless the evidence in the case clearly preponderates against its findings. Id.; see also Jensen v. Brown, 639 P.2d 150, 151 (Utah 1981). Indeed, applying the "clearly preponderates standard", the Supreme Court reviews the record, looking for any "reasonable basis in the evidence" to justify the trial court's findings. See Parks Enterprises, Inc. v. New Century Realty, Inc., 652 P.2d 918 (Utah 1982); Bradford v. Alvey & Sons, 621 P.2d 1240 (Utah 1980); and Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980).

Respondent cites the above because Appellant theorizes that Respondent failed to meet his burden of proof. Appellant's contentions, however, ignore overwhelming evidence which compelled the opposite conclusion of both the jury and the district court below, as if to invoke a retrial of the matter on appeal. Thus, logical standards of review compel affirmation of the trial court's judgment, even in equity cases, unless the evidence clearly preponderates against those findings. Indeed, this Court will ultimately "assume that the trial judge believed those

aspects of the evidence which support his findings and judgment." See Nielson v. Droubay, 652 P.2d 1293 (Utah 1982).

B. In the instant case the Supreme Court should summarily assume the correctness of the trial judgment.

Rule 75(p)(2)(2)(d) U.R.C.P. states that Appellant's brief shall contain "a concise statement of the material facts of the case citing the pages of the record supporting such statement." (Id.) On appeal, Appellant's version of "the facts" contains no citation whatsoever to the record or transcript. As such, it is clearly not responsive to the purpose and intent of Rule 75. See Harmston v. Harmston, No. 19297, filed April 10th, 1984; and State v. Tucker, 657 P.2d 755 (Utah 1982). Indeed, Appellant's entire brief contains only four or five selective references to the trial transcript. Ultimately, Appellant's failure to comply with Rule 75(p)(2)(2)(d) U.R.C.P. allows that this Court will logically assume the correctness of the trial court's judgment, rather than, like Alice, pursue the hare in search of grounds for reversal. As stated by Justice Durham in State v. Steggell, 660 P.2d 252 (Utah 1983):

> This Court will assume the correctness of the judgment below if counsel on appeal does not comply with the requirements of Rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure, as to making a concise statement of facts and citation of the pages in the record where they are supported. Id., citing State v. Tucker, supra; see also Lepasiotes v. Dinsdale, 121 Utah 359, 242 P.2d 297 (1952).

Indeed, in asserting his theory of the lawsuit, Appellant characterizes as "the facts" allegations which not only are bereft of any proper citation, but are also contrary to the trial court's findings. In effect, by failing to specify where the findings

lack support in the evidence, and asserting "facts" contrary to those found by the trial court, Appellant creates such confusion that his appeal, logically, should not be considered at all. See e.g., Utah-Idaho Sugar Company v. Salt Lake County, 60 Utah 491, 210 P. 106 (1922).

POINT II

THE COURT'S FINDING THAT PLAINTIFF ACCEPTED ALL OPTIONS, OFFERS OR COUNTEROFFERS, REGARDLESS OF THEIR NOMENCLATURE, IS CLEARLY SUSTAINABLE ON APPEAL

Point I of Appellant's brief states that the trial court should have found that Respondent never accepted Appellant's counteroffer. AB at I. In finding Respondent accepted the counteroffer, the trial court confirmed the jury's unanimous answer to a specific interrogatory, and further found that, regardless of the nomenclature applied to P5 and P15, "offer", "option", or "counteroffer", that Respondent accepted the same absent variation and within the prescribed time limits. See F13, 19, 27, 40, 42 and 45.

Summarizing Appellant's argument, he states that Trees rejected the counteroffer and failed to physically sign either the December 5th or the December 17th documents. AB at 7. He then selectively excerpts a portion of the May 27th conversation and construes it as being an oral rejection of the outstanding offer. AB at 7-8. Appellant argues that this "oral rejection" terminated Trees' power to accept the offer. Simultaneously, Appellant magnanimously indicates that he would have probably continued with the transaction after May 27th, had Respondent reaffirmed his commitments to the Appellant. AB at 8. Lastly, Appellant argues

that Respondent's May 29th letter should have clearly indicated that he was accepting a "counteroffer", not exercising an "option". Id.

Analyzing the above contentions, Respondent first reasserts that both the jury and the trial judge found that he had accepted all outstanding offers, counteroffers, options or proposals, without variance, and that he did so by his tender on May 29th, 1981. See F19, 45; P24, 25. Regarding signature requirements, Appellant's arguments seem oblivious to well-established Utah doctrine pertaining to integration of instruments. Trees was in Sagaponik, New York at the time of the exercise of P5 and P15. The latter two exhibits were in Utah. Trees' exercise, by letter and accompanying check, in effect legally signed both P5 and P15. P24, 25. Trees' letter, P24, clearly states as follows:

> Dear Walter: In accordance with the terms of our contract, and the extensions thereof, I hereby exercise my option to purchase the property in Utah.

Parole evidence clearly established that the words used by Appellant Lewis in referring to Exhibits P5 and P15 were "the option". See F27. Similarly, Respondent Trees testified that his intention in exercising "the option" was to be bound by both P5 and P15. Supra at 17-18. Indeed, both parties stipulated that P5 and P15 were to be considered as one document for purposes of trial, and this stipulation becomes no less binding upon the Appellant because it is to his disadvantage on appeal. See, e.g., Higlee v. McDonald, No. 18755, filed April 27th, 1984. Indeed,

these two documents are the only ones upon which the Appellant, as signator, could be charged.

The trial court did not find P24 unambiguous. T 4/14/83 at 5. With some inherent ambiguity, the trial court properly considered evidence extrinsic to P24 to delineate Respondent's intent and the enforceability of his contractual obligations. See Hackford v. Snow, 657 P.2d 1271 (Utah 1982); Reed v. Alvey, 610 P.2d 1374 (Utah 1980); see also Eliason v. Watts, 615 P.2d 427 (Utah 1980). Indeed, the principle of the Hackford and Alvey decisions, supra, has been a long-standing one in Utah law, particularly in Plaintiffs' suits for specific performance. See, e.g., Keir v. Condrack, 25 Utah 2d 139, 478 P.2d 327 (1970); and Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261 at 266, 501 P.2d 266 at 270 (1972).

Clearly, Utah precedent allows that a separate writing may satisfy the signature requirements of the Statute of Frauds, so long as some nexus between the writings is shown. Further,

> [t]his requirement may be satisfied either by express reference in the signed writing to the unsigned one, or by implied reference gleaned from the contents of the writings and the circumstances surrounding the transaction. In the latter instance, parole evidence may be used to connect an unsigned document to one that has been signed by the person to be charged. See Gregerson v. Jensen, 617 P.2d 369 (Utah 1980); see also Peterson v. Hendrick, 524 P.2d 321 (Utah 1974); and Miller v. Hancock, 67 Utah 202, 246 P. 949 (1926).

Trees' testimony that he intended to accept both P5 and P15 was overwhelming. The jury so found. The terms used by Trees were exactly those terms which Appellant himself chose to use. See

F27. As a matter of law, Trees signed both P5 and P15. Gregerson, supra.

Appellant's argument that Trees on May 27th orally terminated any option or offer extended to purchase the property further ignores the stipulation that P5 and P15 were left open for Respondent's acceptance until May 30th, 1981. See AB at 8; cf. supra at 10-11. Indeed, it is this stipulation which binds Appellant. Appellant's position that Trees orally rejected the outstanding offer is further repudiated by both parties' testimony that Trees concluded the conversation reaffirming his intent to honor all of his commitments to Appellant. Supra at 15-16. It is further to be noted that Trees' completed negotiations on the DeMille property alone were sufficient consideration to hold the documents open for acceptance until May 30th, 1981. In such a context, Lewis' argument that a disputed oral conversation effectively terminated Trees' ability to accept the offer three days prior to its termination must fail. Indeed, in light of his stipulation, Appellant can hardly ask this Court to find that his offer terminated on May 27th.

Prior Utah cases hold that a noncompliant acceptance of an outstanding offer does not, in itself, terminate the offer if other consideration binds the offeror to contractually hold the offer open. See J. R. Stone Company, Inc. v. Keate, 576 P.2d 1285 at 1288 (Utah 1978). Indeed, in attempting to retract his stipulation that P5 and P15 remained open for acceptance until May 30th, Appellant construes a rejection of the same, not from the statements made by Trees, but rather from Trees' uncommunicated

thoughts. AB at 8. Appellant's counsel then states that up through June 12th of 1981, Lewis was probably disposed to reaffirming the offer. Id. This, however, controverts the trial court finding that after May 27th, Lewis had no intent to close, despite any effort made by Trees. Supra at 16-17. Indeed, both parties conceded that during the period for closing Trees begged Lewis what else Lewis desired in order to close, and that Lewis' response was stony silence. Supra at 18-19. Characteristically, Appellant testified that this behavior fulfilled an earlier promise that Appellant would give Trees a hard time and be a stubborn foe. Supra at 15-16; 2DWL at 125.

Ultimately, despite parole clarification, Appellant's Point I claims that Respondent was required to state he was accepting a "counteroffer" or the "contract" as amended by Lewis. AB at 10. Through May 29th, 1981, however, the terminology universally employed by Appellant in referring to P5 and P15 was "the option". See F27. Indeed, Appellant testified that the word "counteroffer" was not one either Mr. Trees or himself had employed, but rather one first suggested to him by his counsel two weeks later on June 12th, 1981. (2DWL at 87, 109)

Lastly, Appellant incongruously argues that Trees' silence constituted an oral rejection of P5 and P15. Trees tried to close several times, however, and specifically pled with Lewis what else was necessary to close the parties' contract. Supra at 18. During this time, Appellant, not Respondent, remained rigidly silent. Indeed, the only information Trees got was that Lewis' attorney, Mr. Bell, was unhappy with P15. Supra at 19-20.

POINT III

THIS COURT SHOULD REJECT APPELLANT'S CONTENTIONS THAT THERE WAS NO MEETING OF THE MINDS BETWEEN THE PARTIES; THESE CONTENTIONS ARE BOTTOMED ON PROPOSALS DRAFTED BY A NON-PARTY DURING SETTLEMENT AND ORALLY ENCOURAGED AND ACCEPTED BY THE APPELLANT HIMSELF; THESE PROPOSALS DID NOT CONSTITUTE THE INTENT OR UNDERSTANDING OF THE RESPONDENT ON MAY 29TH, 1981

Appellant's second point on appeal argues that P28 and P29, when compared to P15, evidence a failure of the parties' minds to meet. Appellant's argument is sterile, however, and contrary to the following facts. First, in early June of 1981, during the period for closing P5 and P15, Lewis told both Milne and Trees that his attorney, Mr. Bell, did not find P15 acceptable. T188, 191, 233. As a result, Lewis and Milne got together and drafted P28 and P29, with Lewis ultimately instructing Milne to have the documents signed by Respondent and then forwarded to Lewis' attorney. T192, 209. Trees did this thinking that Lewis desired it of him. T192-93, 208-11. Secondly, Trees testified P28 and P29 did not set forth his understanding of the parties' visitation agreement on May 29th, 1981. Thus, although the agreements were within the context of the parties' understanding, Trees clarified that this understanding was more accurately set forth by P15. T188, 206, 211. Clearly, on the date of exercise Trees' understanding and intent was to accept both P5 and P15. T188, 206-07. Thirdly, the trial court, on the basis of uncontroverted testimony, similarly found that P28 and P29 were not binding on Trees, but formed a portion of settlement negotiations, and were inadmissible pursuant

to Rules 52 and 45 of the then applicable Utah Rules of Evidence. T195-96, 226, 402-07, 409-11.

In light of the above, Appellant's assertions that P28 and P29, drafted by Milne with Lewis' concurrence weeks after Trees' exercise, somehow reflected Trees' intent on May 29th, 1981 are incredible. It is incongruous that Lewis should now compare these documents to P15, the document accepted by Trees, and suggest this belated comparison reflects Trees' state of mind on May 29th, 1981. Trees' testimony as to his acceptance of P15 as clearly defining the visitation agreement never varied throughout trial. Indeed, as found by the trial court, Respondent has never withdrawn his tendered acceptance of both P5 and P15 without alteration and modification. See F44. Ultimately, by reason of the parties' stipulation that P15 set forth their visitation agreement, as bolstered by the testimony of both, the trial court held that P15 accurately set forth Lewis' agreed visitation rights. And, as both P5 and P15 were extended to May 30th, 1981, these documents comprise the substance of the only offer, option, or counteroffer then chargeable to Lewis as seller, regarding which Trees had an opportunity to accept or exercise on May 29th, 1981. See POINT II, supra.

POINT IV

APPELLANT'S OBJECTIONS TO OMITTED JURY INSTRUCTIONS ARE INAPPOSITE; SUCH JURY INSTRUCTIONS EITHER MISSTATE THE LAW OR ARE INAPPLICABLE TO THE INSTANT CASE OR WERE SUFFICIENTLY COVERED BY OTHER INSTRUCTIONS

In Point III of Appellant's brief, he indicates that the trial court erred in failing to instruct the jury that an offer or

counteroffer is terminated by a communicated rejection, and cannot be subject to a later acceptance. Appellant's theorizes that Trees orally rejected Lewis' proposal on May 27th, 1981, and thus terminated the same.

As previously set forth, however, these jury instructions neither conform to the facts, the parties' stipulations, nor Utah case law. First, Appellant's version of the May 27th, 1981 conversation selectively omits testimony from both parties that Trees ended the conversation pledging to honor all commitments made to Lewis, and immediately phoned Hatch at Lewis' request. Supra at 15-17. Secondly, Appellant's desired instruction, indicating that any outstanding proposals were terminated by the May 27th, 1981 conversation, is inimical to a joint stipulation. This stipulation provides that regardless of the nomenclature of P5 and P15, the same were open for Trees' acceptance through May 30th, 1981. Supra at 10-11. Simply stated, Appellant's suggestion that these instructions would have eliminated any need for the jury to consider the efficaciousness of Trees' timely May 29th letter of exercise, P24, are directly contrary to an accepted stipulation. Id., cf. AB at 13. Thirdly, beyond the parties' stipulation, Appellant conceded that P5 and P15 were held open to May 30th, 1981 by consideration. This consisted of both Trees' tender of $1,500 and his continuing and ultimately successful negotiations for the DeMille purchase. As discussed in J. R. Stone Company, Inc. v. Keate, 576 P.2d 1285 (Utah 1978), offers supported by consideration are not terminated prior to the agreed time by noncompliant tenders. Appellant

attempts to construe a May 27th, 1981 oral conversation as akin to a rejection of P5 and P15. Appellant's theory and interpretation, however, are contrary to the facts, the stipulations of the parties, and indeed the applicable Utah case law. Appellant's instructions based thereon were properly omitted, and contrary to the jury's specific finding that Respondent accepted both P5 and P15 on May 29th, 1981. See F39, 40.

In the second portion of Point III of Appellant's brief, he objects to the trial court's failure to give a specific legal instruction relative to the Statute of Frauds. The actual jury instructions drafted by the court after extensive consultation with both counsel appear in the record at R3, 289. Instruction No. 22 formulated by the trial court specifically instructed the advisory jury, inter alia, as follows:

> The acceptance of a counteroffer would require the signature of the party who accepts same, or his duly authorized agent, and such party would be bound in all respects by the terms of such counteroffer. In this case the party to accept the counteroffer, if any you so find, would be James F. Trees. R3 at 321.

The court also instructed the jurors that an offer in writing to perform (tender) is equivalent to actual performance if all other respects of the offer are in accord with the parties' agreement. R3 at 317.

Secondly, the Statute of Frauds was fully complied with, as both P5 and P15 were extended by Lewis, the party to be charged, and by P24 Trees also accepted and signed those documents by integration. Supra at POINT II.

Appellant then contends that Trees did not agree that the visitation rights be put in writing. This statement has no support in the record. Trees was ready, willing and able to close and come to Utah to physically sign P15 during June, 1981, the contractual closing period. Supra at 18-19. Lewis, not Trees, refused to close. As finally closed, the recorded documents evidence Appellant's rights of retained visitation. P59, 60, Supp. Record, 6/84.

Appellant's objections to the jury instructions further fail to comply with Rule 51, U.R.C.P., as discussed in Beehive Medical Electronics v. Square D Company, 669 P.2d 859 (Utah 1983). Also, Appellant has failed to set forth wherein all of the instructions read in harmony fail to fairly present in a clear and understandable way the issues of fact and applicable law in the instant case. See, e.g., Anderson v. Toone, 671 P.2d 170 at 175 (Utah 1983).

Ultimately, compliance with the Statute of Frauds is a legal issue, and though fairly presented to the advisory jury, and clearly complied with by Trees, the issue need not have been presented to the advisory jury at all. Simply stated, Appellant is not entitled to a jury trial of any issue as a matter of right in a case predominantly equitable in nature. See Coleman v. Dillman, 624 P.2d 713 (Utah 1981). The jury was appropriately instructed pertaining to Respondent's required written acceptance. Respondent, by an integrated acceptance, complied with the Statute of Frauds. There is no reversible error.

POINT V

THE COURT PROPERLY EXCLUDED P28 AND P29 PURSUANT TO RULES 45 AND 52 OF THE UTAH RULES OF CIVIL PROCEDURE

In his Point IV, Appellant argues the admissibility of P28 and P29, alleging that they directly contradict Trees' statement that he had always been willing to accept P15. Appellant states that P28 and P29, being signed by Trees, bound him, and that he never represented that these did not represent his point of view. Respondent refers this Court to Point III, supra, insofar as P28 and P29 comprised proposals drafted by Milne in consultation with Appellant and submitted to Trees with the indication that if Trees signed, this case would be settled. Trees testified that while these documents approximated the parties' visitation agreement, P15 was what Trees understood and exercised his acceptance on May 29th, 1981. Supra at 29-31. Indeed, P28 and P29 not even in existence at that time!

The trial court, after extensive hearings, excluded these exhibits by reason of both Rules 45 and 52 of the then applicable Utah Rules of Evidence. T386-411. Clearly, under Rule 52 these offers of compromise suggested by Lewis and signed by Trees at Lewis' request should not be used to indicate Trees' state of mind three weeks prior thereto. Rule 52, URE; see also Annot., 26 ALR 2d 878; 15 ALR 3d 13. Alternatively, even were such documents admissible for some limited purpose, the trial court further found that their probative value was substantially outweighed by the potential consumption of time and misleading of the jury that their introduction may well have caused. T409-11.

In this regard, Appellant has not demonstrated in any way where the trial court abused its discretion and that injustice resulted therefrom. Absent this additional showing, Appellant's arguments must likewise be rejected. See State v. McCardell, 652 P.2d 942 (Utah 1982).

POINT VI

ATTORNEY SNOW'S TESTIMONY WAS ADMISSIBLE; THERE WAS NO SURPRISE TO APPELLANT

In Point V of Appellant's brief he argues that the trial court erred in permitting the "surprise waiver" of the attorney-client relationship by allowing attorney Snow to testify at trial. The argument that the court erred in allowing such testimony fails on at least three grounds.

A. There was no surprise to Appellant.

Appellant took Snow's deposition on October 28th, 1981. As Trees was in New York, Snow, without instruction from Trees, was instructed by Snow's acting counsel, Hughes, to invoke the privilege. When Snow's remaining a witness became evident, Trees retained Hughes and clearly stated his position that regardless of the nomenclature of P5 and P15, the same had been accepted. See RI at 83, ¶s 58(B) and 59; see also F19.

Affidavits of both attorney Thompson and attorney Hughes indicate that Jim Trees first waived his attorney-client privilege at his deposition November 20th, 1981. See R3 at 193; R4 at 21; Deposition of James Frederick Trees [hereinafter JFT] at 133. Additionally, every pretrial order submitted by either party in this case lists Steven E. Snow as a witness. At a pretrial

conference in December of 1982, Respondent's counsel disclosed that Mr. Trees would be waiving his attorney-client privilege. Appellant's counsel then indicated that he would like to redepose Mr. Snow, and as a result the court specifically left discovery open until January 10th, 1983 for that purpose. R4 at 21-22, 24-26; R3 at 318-22. Appellant's counsel never availed himself of this opportunity. Finally on the day previous to Mr. Snow's taking the witness stand, both of Respondent's counsel approached Appellant's counsel with Mr. Snow to afford Mr. Bell the opportunity to interview and discuss with Snow the latter's testimony. Id., see also T341.

Appellant's reliance on Phipps v. Sasser, 445 P.2d 624 (Wash. 1968) is misplaced. Indeed, Phipps holds that the timeliness of waiver of privilege cannot be determined by some specific point in time applicable to every case. The Phipps Court then added that the mere listing of a privileged witness on a pretrial order waives the privilege and subjects him to open discovery. Judge Burns left discovery open through January 10th of 1983, specifically to allow Mr. Bell to take an additional deposition of Snow. R3 at 318-22; R4 at 21-22, 24-26. Mr. Bell declined. On appeal he now claims he was never given this opportunity. AB at 20. Not only was attorney Bell given the same, but not having taken it, Respondent's counsel reviewed Snow's testimony privately with Bell prior to Snow's taking the witness stand. There was no surprise.

B. Appellant's counsel opened the door to Snow's testimony at trial.

The testimony of Trees' and Snow's conversations regarding P24 now objectionable to Appellant were first elicited by Appellant's own cross-examination of Trees. AB at 15; but see T141-42, 211-13, 238, 242-43. Ultimately, Snow took the witness stand only to confirm Trees' specific earlier testimony elicited on Mr. Bell's cross-examination. Furthermore, in the early stages of trial Mr. Bell's only objection to Snow's testimony was that it was either heresay or that the questioning itself was suggestive. See T238, 337. Indeed, Mr. Bell's statement in reference to these conversations during trial is telling:

> Mr. Bell: Your Honor, this is a very critical area, and there were many discussions that day on May 28th, and we've had a lot to talk about, and I'd like this witness [Mr. Snow] to testify to as what he remembers and not have any suggestions. T334-35.

These May 28th conversations directly evidenced Trees' intent when exercising the contract in his letter and tender of May 29th. P24, 25. Trees drafted P24 relying on these conversations held the previous day with Snow. Although initially elicited by Bell, it was only after all of the material testimony had come in that Bell, finding the testimony damaging, claimed that he had been surprised. T339-40.

As Appellant's counsel was first to broach the subject of conversations held between Trees and his prior counsel at trial, he is presently precluded from asserting any objections thereto on appeal. Having opened the door to this testimony, it is incongruous that after it is received the Appellant now objects to it. See Barson v. E. R. Squibb & Sons, Inc., No. 18254, filed

April 12th, 1984, IIC; Legler Construction Inc. v. Roberts Inc., 550 P.2d 212 (Utah 1976).

C. Appellant waived any objection to Snow's testimony by his failure to adhere to Utah's contemporaneous objection rule.

As set forth in Point VI B, supra, Appellant's first objection to Snow's testimony, and indeed Trees' testimony as to Snow's statements to him, came well after such testimony was introduced. Having opened the door to such testimony, Appellant's counsel initially objected to the same in only two limited instances as being either heresay or responsive to suggestive questioning. T238, 337. His first objection claiming a surprise waiver of the privilege was not only untimely but well after the subject had been completely broached by both sides, and indeed, even after Appellant's counsel had indicated he desired to hear Mr. Snow's testimony. See T334-39. As a result of counsel's failure to contemporaneously object at trial, this issue must not now be considered on appeal. See, Barson v. E. R. Squibb & Sons, Inc., No. 18254, filed April 12th, 1984 at Point IIB.

POINT VII

APPELLANT'S OBJECTION TO THE LOWER COURT'S AWARD OF ATTORNEY'S FEES IS CONTRARY TO UTAH LAW

The trial court, after extensive testimony, entered a series of findings awarding attorney's fees of $45,000 to Respondent. T698-729; F58-63. Appellant does not specifically assail any of these findings, but rather asks this Court to simply speculate that such fees were unreasonable. Beyond the testimony proffered at trial and the contractual basis for attorney's fees, a perusal of the file reveals that the case was extensive. At

least eight lengthy depositions were taken, yet only two were noticed by Respondent. Several pretrials were conducted and/or continued, and the matter, at Appellant's request, was ultimately tried before an advisory jury for four days. Post-judgment motions primarily filed by Appellant were scheduled throughout the spring of 1983, so that the judgment was not executed until May of 1983, more than three months after trial. R3 at 28. Further arguments additionally setting forth the basis for the fees were also submitted to the trial court in extensive memoranda. R3 at 90-106, 283-300.

Clearly, the trial court had the discretion to make the award; it approximates 55% of that to which Respondent's counsel testified. See Appliance and Heating Supply, Inc. vs. Telaroli, No. 19450, filed May 14th, 1984. Indeed, the award is substantially less than the monies expended by Respondent in this matter. Respondent is further entitled to attorney's fees on appeal. Jenkins v. Bailey, 676 P.2d 391 (Utah 1984).

POINT VIII

THE TRIAL COURT'S SUBMISSION OF INTERROGATORY NO. 5 TO THE JURY IS NOT REVERSIBLE ERROR

In Point VII of his brief, Appellant argues that the submission of Interrogatory No. 5 to the jury was prejudicial and confusing. AB at 21-22. District court judges are rarely able to defend their decisions on appeal. In this case, however, a dialogue between Appellant's counsel and the District Court Judge is telling:

> The Court: You should keep in mind that the jury is an advisory jury and the Court submitted those

> interrogatories to the jury. And the record should show that the language of the last interrogatory [interrogatory no. 5] was changed and tailored specifically at the request of counsel for the defendant [appellant] as the Court was approaching the bench to instruct the jury, and that the trial court executive made the changes while the Court was on the bench, consistent with the language desired by Mr. Bell. . . All right, Mr. Bell, correct me if I am in error, when we were in chambers settling at least any palpable error in the jury instructions, as proposed, and interrogatories, in chambers, the Court excused counsel and I put my robe on and started out, and after I left my chambers, but while waining [sic] between chambers and the courtroom, you asked, with Mr. Hughes and Mr. Thompson, to confer with the Court with respect to changing some of the language in that fifth interrogatory. The Court listened to it, and I didn't agree with it, but both counsel indicated they wanted that change . . . Mr. Bell, do I misstate that?
>
> Mr. Bell: No. T 4/1/83 at 29-31.

On appeal Mr. Bell incongruously contends that the giving of the jury instruction he urged the court to submit to the jury now constitutes reversible error! Any error which may be perceived by this Court, however, has been previously waived by Mr. Bell's own actions. Indeed, as Appellant's counsel suggested that the instruction be given, it can hardly be gainsaid that the trial court did not abuse its discretion in submitting the instruction to the jury. Absent abuse, the interrogatory should not disturb the jury verdict. See E. A. Strout Western Realty Agency, Inc. v. W. C. Foy & Sons, Inc., 665 P.2d 1320 (Utah 1983). Furthermore, not only was the instruction given within the broad discretion of the trial court, in light of the answers to

interrogatories 3 and 4, the submission of instruction no. 5 constitutes little more than harmless error. F 39-40.

POINT IX

SEVERAL ALTERNATIVE GROUNDS SUPPORT THE TRIAL COURT'S DECREE OF SPECIFIC PERFORMANCE

Specific performance as a remedy is not rigidly doctrinaire in nature; its burdens and standards of proof should be invoked only to protect from injustice, and not as a weapon with which to perpetrate an injustice. See Kier v. Condrack, 25 Utah 2d 139, 478 P.2d 327 (1970). Contracts need not provide for every collateral matter or possible contingency to be specifically performed. See Nixon and Nixon, Inc. v. John New and Associates, 641 P.2d 144 (Utah 1982). Dealing with written instruments, this Court has held that realty contracts, like others, should be construed as a whole, and that potential diverse interpretations thereof do not render the same unenforceable. See Jones v. Hinkle, 611 P.2d 733 (Utah 1980). Ultimately, the granting of specific performance must always be tempered by the firm proposition . . .

> that the parties to a contract are obliged to proceed in good faith to cooperate in performing the contract in accordance with its expressed intent. . . Quite beyond this, one party to a contract cannot by willful act or omission make it impossible or difficult for the other to perform and then invoke the other's non-performance as a defense. Ferris v. Jennings, 595 P.2d 857 (Utah 1979).

As stated by the Ferris Court, being an equitable remedy,

> [t]he trial court has considerable discretion in determining whether equity and good conscience require that . . . [specific performance] be granted. Id. at 859.

The following comprise alternative grounds sustaining the advisory jury and trial court decision.

A. Statutory Tender.

The trial court found on substantial evidence that from and after May 27th, 1981 there was no performance which Trees might have tendered upon which Appellant would have closed on the parties' transaction. Supra at 16-17. As such, tender by Trees under Utah law as a condition precedent to specific performance would be legally unnecessary. See Hansen v. Christensen, 545 P.2d 1152 (Utah 1976); Thomas v. Johnson, 55 Utah 424, 186 P. 437 (1919). In the instant case, both parties stipulated that, regardless of its nomenclature, Trees' opportunity to accept Appellant's proposal extended through May 30th, 1981 and that the manner of acceptance was governed by paragraph 5 of P5. Supra at 10-11; see also F10, 23. On May 29th, 1981, Respondent made such a tender, and the same was received shortly thereafter by Appellant. P24, 25; supra at 17-18. Appellant held this tender for over two weeks without comment, and remained silent even after Trees begged him what else was necessary in order to close. Supra at 18-19. Respondent never specified where the tender was defective. Id.; F49-51, 53. Under Utah law, the person to whom a tender is made must, at the time, specify any objections he may have to it or they are waived. Respondent waived any objections. §78-27-3, UCA, 1953; 74 AmJur2d, "Tender" §10; see also Hansen v. Christensen, 545 P.2d 1152 (Utah 1976) and Hackford v. Snow, 657 P.2d 1271 (Utah 1982) n. 7.

B. Contractual Tender.

In Timpanogas Highlands, Inc. v. Harper, 544 P.2d 481 (Utah 1975), the Utah Supreme Court held that usually one who refuses a tender should state the basis of his refusal. Construing the material terms of the parties' agreement, paragraph 11 of P5 would clearly have required Appellant, acting in good faith, to have specified in writing any objection he may have had to Trees' tender, and allowed an opportunity for Trees to cure. See F11, 53. This Appellant chose not to do, as he knew full well that Trees' clear intention was to complete the transaction, and indeed do anything Appellant requested in order to close. Supra at 18-19. Indeed, in light of Trees' substantial compliance with all the terms of the parties' agreement, employing those phrases used by Appellant himself, Lewis' unilateral renegging on their contract alone justified the trial court's decision. See F19, 27, 43, 45, 51; see also Nielson v. Droubay, 652 P.2d 1293 at 1297 (Utah 1982).

C. Good Faith.

The lead Utah case regarding good faith is Ferris v. Jennings, supra. In Ferris, a real estate agent, by mere silence, attempted to frustrate a contract by failing to set forth, despite repeated requests, the amount of a "fair commission" which he was to receive from an oral contract to convey real estate. Mr. Bell's client here acted no differently than did the agent in Ferris. Thus, despite Trees' repeated pleadings during the period of close as to what additional performance would satisfy Lewis, Lewis responded with little more than characteristic stony

silence, or statements to the effect that he had simply "lost faith" in the transaction. Supra at 18-19. The only faith Lewis had lost was good faith. Although unnecessary to the trial court's decision, when Appellant's counsel specifically requested a finding that his client had not acted in bad faith, the trial court denied the same. T 4/14/83 at 11.

D. Estoppel.

Appellant in this case committed to Respondent that his "option" was open for acceptance through May 30th of 1981. In exchange for that promise, Lewis requested that Trees first be able to close on the DeMille transaction, a piece of property which Appellant concedes was little more than a pile of rocks. Supra at 3; P23. In reliance thereon, Respondent committed to purchasing the DeMille property on May 26th, 1981. F31. It was uncontroverted that the final purchase price for the DeMille parcel was substantially in excess of its real value. Supra at 14. Appellant is estopped from denying the contract. See Morgan v. Board of State Lands, 549 P.2d 695 (Utah 1976); and J. P. Koch, Inc. v. J. C. Penney Company, Inc., 534 P.2d 903 (Utah 1975).

E. Frustration of Contract.

Respondent incorporates the facts and law in Point IX A-D, supra. Clearly, Appellant, otherwise imposed with a duty, should not be entitled by his willful acts or omissions, to make it impossible or difficult for Trees to perform and then argue that Trees' alleged failure to perform is a defense to specific performance. Lewis simply refused to close, never stating why. See Ferris v. Jennings, 595 P.2d 857 at 859 (Utah 1979).

F. Part-Performance.

(1) Before trial--Historically to either remove oral contracts from the Statute of Frauds or overcome allegations of indefiniteness, part-performance has generally required both occupation and improvement of real estate. Nonetheless, a line of Utah cases have held that economic detriment alone, if specifically tied to the contract, is sufficient to satisfy the doctrine. See, e.g., LeGrand Johnson Corporation v. Peterson, 26 Utah 2d 158, 486 P.2d 1040 (1971); Randall v. Tracy Collins Trust Company, 6 Utah 2d 18, 305 P.2d 480 (1956); and Van Natta v. Heywood, 57 Utah 376, 195 P. 192 (1920). In the instant case on April 25, 1981, Appellant specifically conditioned Trees' ability to accept the "option" on Trees first being "able to acquire the DeMille property". P23. In fulfilling Appellant's request, Respondent committed $846,000 to be able to purchase the DeMille property, over $230,000 in excess of its value. P58, T136-38. Trees' May 26, 1981 commitment to purchase the DeMille parcel alone constitutes part-performance.

(2) After trial--As set forth supra at 21, Trees has peacefully occupied the property and made substantial improvements thereon for well over a year at the time of the filing of this brief. He has, furthermore, tendered two checks to the Appellant which Appellant cashed. No supersedeas bond has been filed. Thus, even under a historic viewpoint of part-performance, Trees has occupied and made substantial improvements on the ground. Coupled with the checks tendered in compliance with the court-ordered decree of specific performance,

a reversal would now require a peaceful occupant to vacate against his will property he purchased and has improved. A reversal would further, of necessity, require Appellant to return those monies to Respondent which he has accepted pursuant to the decree of specific performance. Consequently, a reversal would contravene the behavior of both parties undertaken, from all appearances, in total conformity with the trial court's decree.

G. Breach of Contract.

Appellant has never complied with paragraph 11 of P5. See also subsection IX B, supra.

H. Reformation.

On the basis of the evidence proffered at trial and recited supra at 2-21, were there any problems in the language to be contained in the deed and mortgage, the trial court in an equity case would be empowered to reform such documents to conform to the parties' agreement, where to do otherwise would result in an injustice. See Mabey v. Peterson, No. 18338, filed April 24th, 1984. Clearly, P59 and 60, as executed pursuant to the trial court's decree of specific performance, conform exactly to what both parties intended in the instant case. Supp. Record 6/84. Indeed, pursuant to such exhibits, Respondent has occupied the subject property and Appellant has received and cashed checks tendered in conformity with the mortgage note, the executed original of which was mailed to Appellant. R4 at 36-37, 42-43.

POINT X

APPELLANT HAS WAIVED HIS RIGHT TO AN APPEAL

After trial and pursuant to the decree of specific performance, Appellant voluntarily vacated the subject matter property and Respondent moved to the ranch on or about June 17th, 1983. See P59, 60; see also supra at 21. The original mortgage note has been tendered to Appellant with two checks totalling $70,000 in conformity to the decree of specific performance. The first check was a cashier's check and the second a personal check; neither had any restrictive language on them at the time of tender. Id. Appellant cashed both checks on September 9th, 1983, indicating on the reverse side his intent to obtain interest thereon pending the outcome in this appeal. Respondent contends that Appellant's acceptance of the checks and retention of these monies constitutes a waiver of Appellant's right to appeal the decree of specific performance which entitled Appellant to the checks in the first place. Respondent earlier unsuccessfully moved to dismiss this appeal, but the argument was reserved for plenary appeal. Thereafter, Appellant belatedly sought a Court order sanctioning his cashing the checks or otherwise allowing him to return the monies to Respondent, arguing that he had now become a self-appointed trustee. This order was denied.

> By a vast majority of precedent,
>
> [a] party who accepts benefits under a judgment waives his rights to appeal with the actual intent of the party pertaining to that right of appeal as a general rule being 'immaterial'. See 4 AmJur2d, "Appeal and Error", §250; see also 169 ALR at 1056.

Appellant's effort to return or tender back these monies is of no

avail to restore the rights lost. See 4 AmJur2d, "Appeal and Error", §251; see also 169 ALR 1057. Thus, in Sierra Nevada Mill Company v. Keith O'Brien Company, 48 Utah 12, 156 P. 943 (1916), Chief Justice Straup indicated that where the receipt of benefits under a contract is indivisible from the validity thereof, their receipt barred further prosecution of an appeal challenging the contract.

In Ottenheimer v. Mountain States Supply Company, 56 Utah 190, 188 P. 1117, 1118 (1920), Justice Frick stated the applicable rule as follows:

> It is elementary that in case a party to an action accepts the benefits of a judgment in his favor or acquiesces in a judgment against him, he thereby waives his right to have such judgment reviewed on appeal.

In Ottenheimer the lessee appealed a termination of his lease. Subsequent to trial, however, he voluntarily surrendered the premises. As the lessee's issues on appeal all sought reaffirmation of the lease, by voluntarily abandoning the property, the Court concluded that regardless of the lessee's subjective intent, his behavior, nonetheless, objectively required a waiver of the litigated questions, precluding appellate review. See also Cornia v. Cornia, 15 P.2d 631 (Utah 1932).

In Jensen v. Eddy, 30 Utah 2d 154, 514 P.2d 1142 (Utah 1973), the Utah Supreme Court considered an appeal, despite the Appellant's acceptance of monies. In so holding, however, the Jensen court specifically found that the parts of the judgment appealed from were separate and distinct from the ruling upon which the payments had been conditioned. See 30 Utah 2d at 157.

In the instant case, however, Appellant's right to receive monies is directly related to the judgment and decree of specific performance. The Jensen case was cited favorably and this distinction noted by Chief Justice Hall in Hollingsworth v. Farmers Insurance Company, 655 P.2d 637 (Utah 1982).

The fact that not all the payments have been made is of no consequence, insofar as they are being timely made as required by the decree. Appellant's acceptance of substantial benefits in excess of $70,000, and his retention of the note alone are clearly sufficient. See 4 CJS, "Appeal and Error", §215 at 644-45. Furthermore, were Appellant to argue that he cashed the check so that at least someone could obtain interest thereon, or that otherwise he might be denied interest on the sale by the appellate process, this argument, at least as to Trees' personal check for $35,000, is unfounded. Personal checks, otherwise uncashed, do not terminate interest to a seller in a judicial setting. See Pack v. Hull Development Company Inc., 667 P.2d 39 (Utah 1983). Thus, had the personal check remained uncashed, interest would still be imposed on Respondent's purchase price in favor of Appellant. Id., see also Le Vine v. Whitehouse, 37 Utah 260, 109 P. 2 (1910).

Appellant voluntarily chose to cash these checks. He retains, either personally or through his attorney, the original mortgage note tendered according to the decree of specific performance. He has vacated the property. He has filed no supersedeas bond. Yet he seeks an appellate reversal which would now require Trees to vacate the property and accept his money back

on a draft prepared by Appellant. Clearly, this Court should not entertain an appeal contrary to the simple thrust of all of Lewis' affirmative acts.

CROSS-APPEAL

THE TRIAL COURT ERRED IN FINDING THAT THE RESPONDENT FAILED TO ESTABLISH A PRIMA FACIE CASE FOR DAMAGES AS AN ALTERNATIVE TO SPECIFIC PERFORMANCE

In the event this Court reverses the decree of specific performance, Respondent contends that the trial court erred in finding that Respondent had failed to present a prima facie case for damages in the alternative to specific performance. Clearly, Appellant was well aware that in compelling Trees to be able to purchase the DeMille property, he was in effect compelling Respondent to negotiate the purchase a pile of rocks at a greatly inflated price. Supra at POINT IX F(2). Conversations throughout the spring of 1981 were held between Respondent and Appellant, and Appellant was well aware that the DeMilles had been both difficult to deal with and worthy foes in Trees' negotiations with them. Having clearly placed Trees in the position where, by personal, legal and moral commitments he was required to close with the DeMilles, if this Court reverses the decree of specific performance, then the Court should also remand the matter so that the legal issue of Trees' damages may be appropriately determined by the jury. Indeed, insofar as the trial court dismissed this portion of Respondent's case without submission to the jury, the standards of appellate review favor reversal, and every inference should be construed in Trees' favor. Of course, this cross-appeal

is material only in the event that the decree of specific performance is not affirmed on any of the many available grounds.

CONCLUSION

The jury verdict and trial court's judgment should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of June, 1984.

Michael D. Hughes

MICHAEL D. HUGHES
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of July, 1984, I mailed a true and correct copy of the above and foregoing RESPONDENT'S BRIEF AND CROSS-APPEAL to J. Richard Bell, attorney for Appellant, at 303 East 2100 South, Salt Lake City, Utah, 84115, postage prepaid.

Michael D. Wight

MICHAEL WIGHT